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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. LENNY SALDANA, Defendant and Appellant.	C079891 (Super. Ct. No. 62-128110B)

A jury found defendant Lenny Saldana guilty of residential burglary with occupants present, robbery in concert (two counts, reflecting two victims), criminal threats (two counts, again reflecting two victims), carjacking (two counts), false imprisonment by violence (two counts), grand theft of a firearm (later reduced by the trial court to a misdemeanor for lack of evidence of value), and personal use of a firearm. (Pen. Code, §§ 213, 215, subd. (a), 236/237, 422, 459, 487, subd. (d), 12022.5, subd. (a),

12022.53, subd. (b).)[1] The trial court sentenced defendant to prison for 27 years four months. Defendant timely filed this appeal.[2]

On appeal, defendant contends that no substantial evidence supports the two carjacking counts (for which sentences were imposed and stayed per section 654), and also that his consecutive sentences for the criminal threats counts should have been stayed pursuant to section 654. We disagree and affirm the judgment.

BACKGROUND

This was a home-invasion robbery of a so-called "medical" marijuana operation. Defendant was a former employee of one of the victims, Mason William Thomas. Defendant and Guerrero, armed with rifles, entered the Loomis house where Thomas lived with his girlfriend, Yvette Marie Ramirez, on February 6, 2014. The victims were bound with duct tape and string and held for hours. At some point a third invader, Velasquez, arrived.[3]

The victims were threatened repeatedly while their house was ransacked. The threats included that they would be shot, have fingers chopped off, be taken to Mexico and be sold or raped (Ramirez), or have child relatives killed (Ramirez). Thomas was forced to reveal a safe combination and both victims were forced to sign pink slips to their vehicles, which were taken by the invaders. Before the invaders left the house, they

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[1] Further undesignated statutory references are to the Penal Code.

[2] Codefendant Juan Jose Vasquez Guerrero (case No. 62-128110A) pleaded no contest to various charges on the day of trial, and later withdrew his appeal. Codefendant Anna Rita Velasquez (case No. 62-128110C), entered a plea bargain before trial, and we later affirmed her convictions. (See *People v. Velasquez* (Feb. 9, 2016; C079329) [nonpub. opn.].)

[3] A third occupant, Teddy Rumulux, a Finnish Spitz-Chow mix, was threatened with death by Velasquez, although he had behaved well after recognizing defendant; Teddy was instead put into a closet after Ramirez gave the intruders her shotgun from it. The taking of that shotgun formed the basis for the firearm theft count.

threatened the victims again, telling them not to leave for some time (the victims' recollection of the amount of time varied, one remembering 15 minutes and the other an hour), or they would be shot by someone waiting nearby.

Defendant and Velasquez were soon arrested in Roseville driving the vehicles they had taken, which contained property stolen from the victims as well as firearms. Guerrero was arrested separately in Roseville near his car, in possession of watches taken during the robbery.

Defendant testified he went to Thomas's house to collect a just debt owed for services rendered at another marijuana operation. Thomas gave him the vehicles as collateral, and arranged to meet him in Los Angeles in three days, pay him $50,000, and retake the vehicles. Defendant took the vehicles without knowing what was in them. He did not have a gun or make threats. Thomas had testified he had paid defendant for his services, but let him go in 2013 because defendant had a methamphetamine problem.

We describe some of the evidence in more detail in the Discussion.

DISCUSSION

I

Carjacking

Defendant contends no substantial evidence supports the two carjacking convictions, specifically, that there was no substantial evidence the cars were taken from the *immediate presence* of the victims, as required, because the record shows the victims were in the house, bound, and the vehicles were outside the house, with the keys in at least one of the vehicles and perhaps in both. We are not persuaded.

After several hours, the invaders decided to leave and told the victims they had three days to come up with $50,000 or they would be killed. By threats, they forced the victims to sign the pink slips to Ramirez's Toyota Camry and Thomas's Toyota Tacoma. Ramirez testified the victims left keys *in her car* because they felt safe where they lived, but appellate counsel reads her testimony to mean the victims *also* left keys to Thomas's

truck in his truck. For purposes of this appeal, we will indulge counsel's broad reading. The invaders then "grabbed everything they could" and drove off in both vehicles.

"A conviction for carjacking requires proof that (1) the defendant took a vehicle that was not his or hers (2) from the immediate presence of a person who possessed the vehicle or was a passenger in the vehicle (3) against that person's will (4) by using force or fear and (5) with the intent of temporarily or permanently depriving the person of possession of the vehicle." (*People v. Magallanes* (2009) 173 Cal.App.4th 529, 534.)

As can be seen from its elements, carjacking is a species of robbery and shares the requirement that the property be taken from the "person or immediate presence" of the victim. (§ 215, subd. (a); see *People v. Johnson* (2015) 60 Cal.4th 966, 989 [discussing similarities between carjacking and robbery] (*Johnson*).)

"[S]omething is in a person's 'immediate presence' if it is ' " 'so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it.' " ' [Citations.] 'Under this definition, property may be found to be in the victim's immediate presence "even though it is located in another room of the house, or in another building on [the] premises." ' [Citation.] Or, as the Court of Appeal recently said, 'A vehicle is within a person's immediate presence for purposes of carjacking if it is sufficiently within his control so that he could retain possession of it if not prevented by force or fear.' " (*Johnson*, at p. 989, quoting *People v. Gomez* (2011) 192 Cal.App.4th 609, 623 (*Gomez*), disapproved on other grounds, *People v. Elizalde* (2015) 61 Cal.4th 523, 538, fn. 9.)

In *Johnson*, the evidence showed the victim's car was in a garage that was separated from her kitchen by a breezeway, and that she normally kept the car keys in the kitchen. On that record, our Supreme Court held that the jury could reasonably find she had control of the car before Johnson killed her and took her keys. (*Johnson*, *supra*, 60 Cal.4th at p. 990.)

In *People v. Hoard* (2002) 103 Cal.App.4th 599, Hoard robbed a store at gunpoint, tied up the employees, took the keys from one of them, and drove off in her car. (*Id*. at pp. 602, 608.) "Defendant took possession of Gibeson's car by threatening her and demanding her car keys. Although she was not physically present in the parking lot when he drove the car away, she had been forced to relinquish her car keys. Otherwise, she could have kept possession and control of the keys and her car." (*Id*. at p. 609.)

In *Gomez*, the victim (Estrada) was beaten by four men (including the Zamoras) at his apartment complex early in the morning. The men took the keys to his truck, drove off in Gomez's car, then returned about 10 or 20 minutes later and drove off with Estrada's truck, which was parked about 10 feet away, while Estrada watched. (*Gomez, supra*, 192 Cal.App.4th at pp. 613-616.) *Gomez* upheld the carjacking count, finding "although Estrada was inside his apartment at the time the Zamoras took his truck, the truck was only approximately 10 feet away from him. He watched the men through his window and made eye contact with them. Under the circumstances . . . the jury could reasonably find that Estrada was fearful of a further assault and would have acted to stop the Zamoras and retain possession of his truck if not prevented by such fear. The fact that 10 or 20 minutes had elapsed between the physical assault and the taking of the truck is insignificant. *Regardless of the passage of time, fear was being used against Estrada at the time the vehicle was taken*." (*Gomez* at p. 624, italics added; see *People v. Medina* (1995) 39 Cal.App.4th 643, 646-647, 651-652 [even if the victim had been lured away from vehicle by trick or device, it was taken from his immediate presence when he was handcuffed, his keys were taken and he was beaten into submission].)

Here, even if both sets of keys were left in the respective vehicles, the jury could find the victims were paralyzed by the threats from trying to stop the takings. Further, the invaders forced the victims to sign over the pink slips--in their immediate control--by threats. Certainly the jury could find that securing the title to the vehicles emboldened

the invaders to take them. This is not like a case where someone happens to find the keys in a car and drives away, merely committing joyriding or a motor vehicle theft.

Defendant places reliance on *People v. Coleman* (2007) 146 Cal.App.4th 1363 but that case is distinguishable. As summarized by *Johnson*:

> "In that case, the owner of a Chevrolet Silverado parked it in front of his business establishment, left his keys in the shop, and left. The defendant later entered the business establishment, forced the office manager to give him the keys to the truck, and then drove away in the truck. The office manager owned neither the truck nor the keys. The Court of Appeal found insufficient evidence to support a conviction that the defendant was guilty of carjacking the Silverado. As explained in *Gomez* in distinguishing that case, although the *Coleman* 'court "acknowledge[d] that a carjacking may occur where neither the possessor nor the passenger is inside or adjacent to the vehicle," the circumstances in this case were "simply too far removed from the type of conduct that [the carjacking statute] was designed to address." [Citation.] The office manager, the court explained, "was not within any physical proximity to the Silverado, the keys she relinquished were not her own, and there was no evidence that she had ever been or would be a driver of or passenger in the Silverado." [Citation]' (*People v. Gomez*, *supra*, 192 Cal.App.4th at pp. 624-625.)" (*Johnson, supra,* 60 Cal.4th at p. 991.)

Here, the owners of the vehicles were present (in "physical proximity"), were forced to sign over the pink slips by threats, and were prevented from stopping the taking of their vehicles both by bondage and by threats. In such circumstances, we find substantial evidence to support the "immediate presence" element necessary to uphold the carjacking counts.

II

Section 654

Defendant contends the sentences imposed for counts four and five, the criminal threat counts, should have been stayed (§ 654) because the threats against Thomas and Ramirez were part of the same course of conduct and had the same objective as the robberies, as charged in counts two and three. We disagree.

In relevant part, section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

"[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.] Whether a course of conduct is indivisible depends upon the intent and objective of the actor. [Citation.] If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) "It is defendant's intent and objective, not the temporal proximity of his [or her] offenses, which determine whether the transaction is indivisible." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) "A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence." (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

On appeal, the Attorney General points to the threats just before the invaders left, to frighten the victims into delaying reporting the crime. We agree these were separate from the threats necessary to complete the robbery.

The elements of a robbery are satisfied as soon as property is moved--that is, when "asportation" occurs. (See *People v. Navarette* (2003) 30 Cal.4th 458, 502.) The record shows the invaders took property before they made their final, parting, threats.

In *People v. Coleman* (1989) 48 Cal.3d 112, our Supreme Court upheld separate sentences for assault and robbery, holding: "There is ample evidence to support the trial court's implicit finding that defendant's intent and objective in assaulting Karen, by stabbing her, was separate from, rather than incidental to, his intent and objective in committing the robbery. Prior to the assault, defendant had essentially completed the robbery by compelling Karen to assist and not interfere with his gathering the valuables

and preparing for flight. Ms. Neidig then entered the kitchen, and defendant killed her with the shotgun. He next ordered Karen to lie down and stabbed her in the back. The trial court could properly conclude that defendant committed the assault with the intent and objective of *preventing the victim from sounding the alarm about the murder*, and that this intent and this objective were separate from, not incidental to, the robbery." (*Id*. at pp. 162-163, italics added.) Here, the parting threats were on their face designed to prevent the victims from "sounding the alarm" and seeking help against the invaders.

Defendant relies on the principle that a robbery is not *complete* until the robbers have reached a place of relative safety. (See *People v. Burney* (2009) 47 Cal.4th 203, 246, fn. 13.) He reasons that until they reached safety, all of their threats were incidental to the robbery. But, that rule--extending the length of a robbery beyond the point of asportation--applies when considering whether the *felony-murder rule* applies, not when section 654 applies. In a case where robbers took money from a store clerk and managed to open the register till, *then* one robber shot a non-resisting employee, the appellate court held separate sentences for robbery and attempted murder were appropriate, because "Once robbers have neutralized any potential resistance by the victims, an assault or attempt to murder to facilitate a safe escape, evade prosecution, or for no reason at all, may be found by the trier of fact to have been done for an independent reason." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191.) That court examined the already-tortuous history of section 654, and concluded: "Bluntly stated, Penal Code section 654 has not been applied consistently. We believe it is reasonably clear, however, that a separate act of violence against an unresisting victim or witness, whether gratuitous or to facilitate escape or to avoid prosecution, may be found not incidental to robbery for purposes of section 654. If the trier of fact determines the crimes have different intents and motives, multiple punishments are appropriate. *This is so notwithstanding that for purposes of the felony-murder rule the robbery is still considered to be ongoing*. Intent and motive are not at issue in that situation, beyond proof of an intent to rob; and *legal*

fictions surrounding application of the felony-murder rule should have nothing to do with sentencing choices in cases where the victim survives and the one offense does not constitute an element of another." (*Id*. at p. 193, italics added.) We agree with that reasoning in the context of robbery and section 654.

The victims were bound and unresisting when they were threatened yet again, this time with a very specific purpose and unlike the prior criminal threats designed to obtain property. This parting threat was that someone was watching the property and would shoot the victims if they did not remain in the house for a period of time, a threat made in order to facilitate the invaders' escape. Accordingly, we find a rational evidentiary basis in the record for the trial court to implicitly conclude that the invaders threatened both victims with a separate intent to facilitate escape after they had completed the robberies.

DISPOSITION

The judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Hull, J.